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4 BEFORE THE PERSONNEL APPEALS BOARD
5 STATE OF WASHINGTON
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7 MICHAEL VARGAS,) Case No. RED-04-0006
8 Appellant,)
9 v.) FINDINGS OF FACT, CONCLUSIONS OF
10 DEPARTMENT OF CORRECTIONS,) LAW AND ORDER OF THE BOARD
11 Respondent.)
12)
13

14 I. INTRODUCTION

15 1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for
16 hearing before the Personnel Appeals Board, GERALD L. MORGEN, Member. The hearing was
17 held in the Evergreen Conference Room at the Office of the Attorney General, West 1116 Riverside
18 Avenue, Spokane, Washington, on February 16, 2005. BUSSE NUTLEY, Vice Chair, listened to
19 the recorded proceedings, reviewed the file and exhibits and participated in this decision.
20

21 1.2 **Appearances.** Appellant was present and was represented by Christopher J. Coker, of Parr,
22 Younglove, Lyman & Coker, P.L.L.C. David La Raus, Assistant Attorney General, represented
23 Respondent Department of Corrections.
24

25 1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of reduction in salary for
26 neglect of duty and willful violation of published employing agency or Department of Personnel

1 rules or regulations for having inappropriate conversations and making inappropriate comments to a
2 female offender.

3 4 **II. FINDINGS OF FACT**

5 2.1 Appellant is a Correctional Officer (CO) 2 and permanent employee for Respondent
6 Department of Corrections (DOC). Appellant and Respondent are subject to Chapters 41.06 and
7 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a
8 timely appeal with the Personnel Appeals Board on February 23, 2004.

9
10 2.2 Appellant began working at the Pine Lodge Pre-Release in June 1998. Appellant's
11 personnel record reflects one memo of concern in 1999, a letter of reprimand in March 2000
12 regarding an off duty incident in which Appellant was uncooperative with law enforcement and
13 violated the agency's policy regarding the use of his DOC badge, and a subsequent letter of
14 reprimand for insubordination when he failed to follow his supervisor's directive to provide a
15 written description of the March 2000 off duty incident. In addition, Appellant received a letter of
16 reprimand dated October 12, 2001, when he became aggressively engaged with an offender and
17 failed to comply with a superior's directive to back away from the situation.

18
19 2.3 As a Correctional Officer 2, Appellant is expected to adhere to DOC's Employee Handbook,
20 including the Code of Ethics, which states that "[h]igh moral and ethical standards among
21 correctional employees are essential for the success of the Department's programs." DOC
22 employees are also expected to be "impartial, understanding, and respectful to offenders" and are
23 prohibited from using profanity and inflammatory remarks with offenders or engaging in personal
24 relationships with offenders. Appellant has received training on staff/offender relationships,
25 including Offender Manipulation and Working with Female Offenders classes.

1 2.4 DOC has adopted Policy Number 801.005, Employee Relationships with Offenders. Under
2 the subsection entitled "Favoritism/Professionalism," the policy states, "[w]hile employees must
3 recognize the individuality of offenders, they must do so without showing favoritism." The
4 subsection entitled "Association with Offenders" states, in part:

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6 A. Association with offenders, beyond that which is required in the performance
7 of official duties with the Department, is prohibited in the interest of
8 professional unbiased service. . . .

9
10 E. Physical contact or communication of a sexual nature directed toward an
11 offender that established an inappropriate relationship . . . is prohibited.

12
13 2.5 On September 26, 2003, Offender G. R. reported that Appellant had recently made the
14 comment "How's your baby's daddy?" to her and that she and Appellant then engaged in the
15 following conversation:

16 Offender G. R. replied, "How's our baby's mama?" Appellant then said, "What he
17 won't accept your calls?" and Offender G. R. replied, "You're just hating cause your
18 baby's mom's fucking your best friend." Offender G. R. then went on to say, "I get
19 more pussy than you on a bad day." Appellant then replied, "And every time you do,
20 you end up in the SHU."

21 2.6 Correctional Unit Supervisor (CUS) Laura Burgor-Glass initiated a fact-finding
22 investigation and subsequently filed an Employee Conduct Report (ECR) regarding Appellant's
23 alleged inappropriate and sexual comments and Offender G. R.'s claim that Appellant frequently
24 joked with her and had similar conversations with her of a sexual nature.

1 2.7 CUS Ronald Pedersen conducted the investigation into the ECR and subsequently spoke
2 with Community Corrections Officer (CCO) Carrie Daniel regarding a meeting she had with
3 Appellant and Offender G. R. on September 11, 2003. CCO Daniel testified that when she met with
4 Appellant and Offender G. R., Appellant apologized to the inmate, stating that he did not want to
5 offend her.

6
7 2.8 Appellant testified that it was Offender G. R. who made inappropriate comments to him
8 while in the dining hall and that he told her to “knock it off.” Appellant did not infract Offender G.
9 R. for inappropriate behavior. Appellant stated that CCO Daniel’s statement regarding an apology
10 was inaccurate, and he denied ever apologizing to Offender G. R. Appellant testified that what he
11 did say to Offender G. R. was that he was sorry she thought she could talk to him in that manner.

12
13 2.9 CO J. Wayne Hill was working in the dining area around the time of Appellant’s interaction
14 with Offender G. R. CO Hill testified that Offender G. R. seemed agitated and angry toward
15 Appellant but that she would not tell him the reason for her anger.

16
17 2.10 Based on a preponderance of the credible testimony, we find that Appellant likely engaged in
18 an inappropriate discussion of a personal and sexual nature with Offender G. R. We also find it
19 unlikely that Appellant would apologize to an offender unless he had engaged in inappropriate
20 conduct. Furthermore, we find no reason for CCO Daniel to be untruthful in describing what she
21 believed was an apology made by Appellant to the offender.

22
23 2.11 On December 5, 2003, Pine Lodge Pre-Release Superintendent Donna Cayer met with
24 Appellant and provided him an opportunity to respond to the ECR. Appellant denied making
25 inappropriate or unprofessional comments to offender G. R. and, initially, denied having any
26 exchange of words with Offender G. R. Superintendent Cayer also considered a statement made by

1 CO Jason Finke in which he claimed to have heard Appellant engage in an inappropriate, sexual
2 banter with Offender G. R. Appellant told Superintendent Cayer that he did not recall having a
3 conversation with Offender G. R. in the presence of CO Finke. Superintendent Cayer determined
4 that Appellant had not been truthful and forthcoming in his responses to the allegations and that he
5 presented too many inconsistencies in his responses to her questions. On the other hand,
6 Superintendent Cayer found that statements provided by CCO Daniel, CO Hill, and CO Finke
7 supported the allegations because Offender G. R. had been upset and angry with Appellant over the
8 incident in the dining hall, he offered an apology to her, and he had engaged in similar discussions
9 with the same offender on another occasion.

10
11 2.12 By letter dated January 30, 2004, Superintendent Cayer notified Appellant of his reduction
12 in salary from Range 40, Step K, to Range 40, Step I, effective February 16, 2004 through May 15,
13 2004, inclusive. Ms. Cayer charged Appellant with neglect of duty and violation of agency policy
14 for having inappropriate conversations and making inappropriate comments to female offender G.
15 R. Superintendent Cayer alleged that Appellant made the comment, "How's your baby's daddy?"
16 to Offender G. R. and continued to engage her in a conversation that consisted of sexual overtones.

17
18 2.13 In determining the level of discipline, Superintendent Cayer reviewed Appellant's personnel
19 file and concluded he had demonstrated a pattern of misconduct. Superintendent Cayer also
20 considered Appellant's training on proper relationships between staff and offenders and believed
21 Appellant understood the department's expectation for appropriate and professional
22 communications. Superintendent Cayer did not find Appellant's denial of having inappropriate
23 conversations with Offender G. R. credible and questioned his integrity. Superintendent Cayer was
24 also concerned that Appellant's actions showed favoritism to an offender and therefore,
25 compromised the safety and security of Appellant's work area, undermined his credibility with
26 fellow staff, and damaged his ability to supervise offenders. Superintendent Cayer concluded that a

1 reduction in salary was warranted and was the appropriate level of discipline to reflect the
2 seriousness of his actions.

3 4 **III. ARGUMENTS OF THE PARTIES**

5 3.1 Respondent argues Appellant neglected his duty to maintain proper boundaries with the
6 offender when he participated in a banter of inappropriate comments. Respondent argues
7 Appellant's assertion that he acted professionally and did not make inappropriate statements is not
8 credible. Respondent contends Appellant's version of the event is contrary to the credible
9 testimony and witness statements that consistently show Appellant engaged in inappropriate
10 discussions with Offender G. R. Respondent contends Appellant acted evasively about apologizing
11 to the offender and argues that it does not make sense for Appellant to offer an apology to an
12 offender without a reason. Respondent argues the department imposed a minimal disciplinary
13 action to send Appellant a message that his unacceptable behavior will not be tolerated.

14
15 3.2 Appellant contends he is not at fault for the interaction he had with the offender and argues
16 it was the offender who exhibited unprofessional behavior. Appellant argues there is no direct
17 evidence that he instigated or enabled the conversation with Offender G. R. and argues he did not
18 act unprofessionally. Appellant argues Offender G. R. has an aggressive personality and asserts he
19 did not want to address the issue with her in the presence of other inmates. Appellant argues his
20 main concern for later speaking with her was to put an end to her inappropriate comments toward
21 him and not to apologize to her for any reason. Appellant argues he has been truthful in his
22 responses and asserts the department unfairly placed more credibility on the offender's statement
23 than on his word as a correctional officer.

24 25 **IV. CONCLUSIONS OF LAW**

26 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

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2 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
3 the charges upon which the action was initiated by proving by a preponderance of the credible
4 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
5 sanction was appropriate under the facts and circumstances. WAC 358-30-170; [WAC 251-12-
6 240(1)]; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

7
8 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
9 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
10 of Social & Health Services, PAB No. D86-119 (1987).

11
12 4.4 Willful violation of published employing agency or institution or Personnel Resources
13 Board rules or regulations is established by facts showing the existence and publication of the rules
14 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
15 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

16
17 4.5 Appellant has a duty to exhibit ethical and professional standards and refrain from showing
18 any preferential treatment when dealing with offenders. Respondent has proven by a preponderance
19 of the credible evidence that Appellant neglected his duty to interact with offenders in a
20 professional manner and maintain appropriate boundaries. Furthermore, Appellant violated DOC
21 Policy 801.005, which strictly prohibits employee relationships with offenders beyond the
22 professional communication required of a correctional officer.

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24 4.6 Therefore, under the proven facts and circumstances, Appellant's reduction in salary is the
25 appropriate sanction, and the appeal should be denied.
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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Michael Vargas is denied.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

Busse Nutley, Vice Chair

Gerald L. Morgen, Member